

Fairness and Contracting Integrity in NASA's Space Communications Networks Services Competition

A report by the Majority staff of the Committee on Science and Technology to
Chairman Bart Gordon, Committee on Science and Technology, and
Chairman Brad Miller, Subcommittee on Investigations and Oversight.

Released: July 13, 2010

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Committee staff received several allegations about contract misconduct by the management and acquisitions staff of the Goddard Space Flight Center (GSFC). These all related to large support contracts managed out of the Center. Many of the allegations were tied to the current Space Communications Networks Services (SCNS) contract competition. After a thorough review of the materials provided to the Committee by NASA and others and many interviews by Committee staff of both current and former National Aeronautics and Space Administration (NASA) employees, contractor employees involved in the SCNS competition from ITT, Honeywell and outside consulting firms, and discussions with contract law specialists at the Government Accountability Office (GAO) and the Congressional Research Service, we believe that staff at GSFC have engaged in conduct that is inconsistent with either the provisions of the Federal Acquisition Regulations (FAR) or the agency's own rules. The result is that the SCNS competition has been skewed in such a fashion that, at a minimum, creates the appearance of the agency favoring one bidder over another.¹

¹ While this report focuses on the SCNS award, the Subcommittee did request from NASA files related to the ManTech International Corporation protest of the award to Analox Corporation of the Environmental Test and Integration Services (ETIS) contract in January 2008. The staff reviewed those records, additional materials provided by the company, and spent many hours in interviews with Mantech employees and officials. Our review turned up at least one unusual step taken by the ETIS Source Evaluation Board (SEB) in managing that acquisition as well as a controversy that broke near the end of the competition which impacted the ability of ManTech to compete. The SEB actually decided to rework the technical challenges posed to the competing firms after the initial responses to the Requests for Proposals had been submitted by bidders, effectively changing (and narrowing) the scope of work being evaluated in making the award. Also during the procurement, allegations were made by another contractor's employee of engineering misconduct by a ManTech employee. NASA appointed a Tiger Team and demanded that ManTech institute a recovery plan, which they dutifully did. ManTech cooperated with NASA in this matter even though they did not believe the allegation to be true. At the time ManTech wanted to meet the concerns of its customer and keep NASA happy as a competition was ending, but the matter did show up in the discussions of the SEB. A similar pattern of targeted complaints coupled with demands for a recovery plan and contractor efforts to placate NASA seems to have played out with Honeywell in the SCNS competition. An interesting perspective on the ETIS award can be found in the Nash & Cibinic Report of August 2008, "Still Waiting for a Reformed and Streamlined Acquisition Process: Another Essay-Writing Contest." The staff are continuing to review the ETIS procurement.

Background and Executive Summary

The NASA space network includes ground facilities around the world. Principal locations include Wallops Island, Virginia, the White Sands complex in New Mexico and Guam. NASA uses this network to maintain command and communications relations with its satellite network as well as with human space missions. NASA also provides space communications services to other government agencies that need this capability.

In 2003, NASA awarded the Near Earth Networking Systems (NENS) contract to Honeywell Technology Solutions Incorporated (hereinafter “HTSI” or “Honeywell”). This was a five year, cost-plus-award fee contract that included elements of “core” work in managing the space communications network as well as an undefined level of indefinite delivery/indefinite quantity (ID/IQ) work that would cover ground network management, as well as maintenance, engineering, and development services. Honeywell, or a predecessor firm Honeywell had acquired, had held the management and operations contract for the space communications network for over two decades.

Also in 2003, ITT Advanced Engineering Services (ITT) division won a "mission service program" contract with NASA to provide systems engineering support work to Code 450, the space communications group at Goddard, as well as for other assignments including support to the Headquarters space communications group. Much of ITT's work directly overlapped with Honeywell's NENS work, and included direct evaluations of HTSI's engineering design efforts. ITT was providing what the FAR describes as Systems Engineering and Technical Assistance (SETA) work.

In 2007, NASA began to ramp up for a competition to the follow-on contract to NENS. This competition, renamed the Space Communications Networks Services (SCNS) contract, would be for a five year contract worth \$1.3 billion in core and ID/IQ work. By April of 2007, NASA had received an expression of interest in competing for this contract from both HTSI and ITT. The contract competition was to be managed by the staff of the Goddard Space Flight Center (“GSFC” or “Goddard”). However, the Source Selection Authority (SSA) would remain at headquarters with the Associate Administrator for Space Operations, Bill Gerstenmaier.

ITT's expression of interest should have set off alarm bells at NASA. SETA contractors are explicitly called out in the FAR as requiring special attention because of their unique access to information among other firms and in agencies. The FAR warns in Section 9.5 of the need for agencies to take special steps in assessing the possibility that SETA contractors may create an organizational conflict of interest (OCI) that the agency must take steps to assess, identify and mitigate. If mitigation is required, it can be as extreme as barring a SETA contractor from

competing for the contract.²

Mitigating OCI issues is NASA's responsibility under the law. Documents provided the Committee show that the agency neglected to address OCI issues in a way that would guarantee fair and open competition. The FAR would suggest those issues should have been addressed when ITT was first awarded the SETA contract in 2003 with meaningful restrictions in their contract regarding future competition. Absent an assessment at that point, NASA acquisitions staff, with guidance from counsel and technical experts, should have engaged in a detailed review of ITT's SETA work for Code 450 when ITT expressed an interest in bidding on the SCNS contract in April of 2007.

Neither in 2003 nor in 2007 did NASA acquisitions staff examine whether ITT may have an unmitigated conflict of interest. Committee staff does not possess the technical knowledge to make an independent determination of a conflict of interest, but there are huge and obvious overlaps between HTSI assignments for NASA and ITT assignments to monitor HTSI or evaluate their engineering proposals for Code 450.

Based on the documents provided to the Committee, it is clear that NASA addressed the OCI issue only in response to HTSI raising the matter in the closing days (February 2008) of the original SCNS RFP process. Honeywell submitted three questions to the agency related to the SETA contractor and the steps taken to mitigate OCI. The record indicates that NASA completely denied that OCI issues were in play without ever conducting a thorough review of the situation by agency staff. Such a review would have required detailed analysis involving task monitors on both the NENS contract and the ITT SETA contract to get a sense of where there was overlap, whether any sensitive information or competitive advantage could accrue to ITT and what steps NASA should take to mitigate any conflict. NASA did not engage in such work in response to the HTSI questions. Rather NASA's record is one of moving as quickly as possible to a position from which they could simply assert that no unmitigated conflicts of interest existed.

NASA's conclusion on this matter was based on a legal conclusion that in a contract dispute GAO--which is the usual authority a losing bidder turns to when they believe a government contract has been improperly awarded--would defer to the agency's position if the agency represented that there was no unmitigated OCI unless the firm making the accusation had "substantial facts and hard evidence." This allowed NASA to make an assertion of no unmitigated OCI and trust that it would stand up to challenge so long as no written directions to ITT would undercut it. NASA acquisition staff did engage in an effort to make sure there was no written record that might undermine the agency's assertion. This conduct may protect the agency from a contract award challenge on OCI grounds, but it does not substitute for an honest

² See Appendix 1 for the text of FAR 9.5.

effort to assess whether an OCI requiring mitigation exists nor does it reflect adherence to the letter or spirit of the FAR. Goddard's failure to meaningfully examine the issue of whether its SETA contractor had an unmitigated OCI created a situation in which a fair and open competition cannot be assured.

In October of 2008, NASA announced that the SCNS contract would be awarded to ITT. Honeywell protested the award to the GAO. GAO sustained the company on one issue--that NASA had improperly scored the ITT bid for its past performance and recommended that the agency reevaluate the past performance score and reissue the award. NASA complied with GAO's recommendation and in April of 2009 again awarded the contract to ITT. Honeywell again protested to GAO. GAO took the unusual step of agreeing to hold a hearing on the matter with NASA officials present to explain their conduct. GAO again let NASA know that if forced to rule, it would sustain the protest on the grounds that ITT's past performance score was too high based on the firm's limited relevant past performance. The issue was not about the quality of ITT's past performance, but that their relevant past contracts were simply too small to show their readiness to manage a contract the size of SCNS. In July of 2009, NASA voluntarily withdrew the award and immediately began working on how to reevaluate past performance for both bids.

Based on materials provided to the Committee, it appears that the competition has been very, very close--a matter of a very thin margin in both awards to ITT over HTSI. However, the GAO directions on past performance would suggest that HTSI would fare better for the third award. However, in August of 2009, the Fee Determination Official (FDO) in charge of the NENS contract, Goddard's Flight Director, George Morrow, rejected the Performance Evaluation Board's (PEB) recommended performance scores and fee for HTSI's 11th performance period (the 9 month extension period). Their recommended consolidated score was an 86 or "very good". Morrow ordered the Board to "objectively rescore" the company in a way that would dramatically lower Honeywell's score. The PEB Chair did not object to this order, nor remonstrate with the FDO even though the process for determining fees was entirely set aside. The PEB Chair even sent Mr. Morrow an e-mail suggesting that his key source on Honeywell's poor performance was not entirely reliable. The record also shows that PEB Members concerned about the rationale for re-evaluating the PEB scores were simply brushed aside or never responded to.

Morrow's written guidance complains about personnel issues and problems HTSI had with managing technical development tasks. However, the tasks which HTSI had trouble with represented just two task orders worth \$4.1 million out of the \$139 million of work carried out in the 11th performance period. Neither the two projects involved, nor the general NASA expressions of concern about staff retention by Honeywell, had any demonstrable impact on mission success, human space flight or launch and payload delivery. The core of the contract for day-to-day management of the space network was rated at 91 points--an excellent. The PEB

ultimately reported out new technical and project management scores 20 points below HTSI's prior period's score and completely out of line with any scores during the 10 prior award periods.

While the Fee Determination Official has enormous latitude under NASA rules to make decisions regarding award fees, the award fee process is still a rule-bound activity. Morrow ordered the change in scores without reviewing the task monitors' scores for HTSI's work, without reviewing the Areas of Emphasis guidance that had gone to the contractor, and without independently validating information he had received through other sources that was critical of HTSI's performance on three task orders and in hiring and retention issues. His conduct also violated the NASA award fee determination policy and the Performance Evaluation Plan (which the FDO approves) for the NENS contract. Both of those require the FDO to meet with the PEB to discuss its recommended scores and awards. Morrow declined to meet on the matter, and the PEB Chair did not insist. The FDO is empowered to deviate from the PEB's recommended scores and fee, but he is supposed to document and record his reasons in the contract file, which Morrow did not do. Instead of following the Performance Evaluation Plan process, Mr. Morrow simply ordered the PEB to give him a new set of scores and fee that he could agree to.

Far more was at stake in the evaluation of HTSI in the 11th performance period than the size of its award fee. As noted above, past performance by ITT had been an appeal issue that HTSI used successfully with GAO in two successive appeals of the SCNS contract award. By lowering HTSI's performance scores from the proposed "very good" to a "satisfactory", Morrow and the PEB would have a direct impact on Honeywell's past performance evaluation in the still open SCNS competition in precisely the area where the competition was being reviewed.

Staff cannot determine whether Goddard staff purposely acted to lower Honeywell's 11th period scores to impact the SCNS competition. It is difficult to believe that Morrow, a long-time, senior GSFC official, was not aware of the competitive situation in the SCNS competition and understood the implications of his action for that competition. Under those circumstances, diligence would have required that he gather more information than he did before ordering the PEB to act in a fashion so contrary to its original will. Whether the result of arbitrary and capricious management, or a calculated effort to skew the competition in ITT's favor, the 11th performance period score process appears to have been unfair to HTSI and would tend to undermine the fairness of the SCNS competition.

Committee staff anticipate that NASA will vigorously dispute the claims and conclusions of this report. In the case of OCI, NASA's position is that if the issue mattered, Honeywell could have complained about it to GAO.³ In other words, it is up to the competing firms to make sure that

³ This was the explicit message given by NASA's General Counsel to Subcommittee Chairman Brad Miller in a phone conversation on Wednesday, May 26, 2010. The message was reaffirmed in a June 10, 2010 letter from L. Seth Statler, Associate Administrator for Legislative and Intergovernmental Affairs, NASA to Chairman Miller with

NASA adheres to the FAR, not the agency. This is an absurd response. The Committee has to be assured that NASA manages its multi-billion dollar acquisition enterprise with integrity and fairness as mandated in federal contracting law and regulation. Whether Honeywell should have pursued an OCI complaint to GAO is a corporate decision only Honeywell is responsible for.⁴ Whether NASA has complied with the law, and protected fair competition and taxpayer interest, is a question that the Committee has the responsibility to pursue.

In the case of the award fee, NASA will point to a record of unsatisfactory performance by HTSI during the 11th period in at least two of the task orders assigned the firm. If either of those poor performances had led to a mission failure or the loss of life, perhaps it would make sense to elevate those two items above all the others. However, the original PEB process already took into account the poor performance of the contractor in those two areas and still awarded the firm scores that were described as “very good.” This is because NASA’s award fee process is designed to provide clear signals to the contractor across the breadth of their efforts and balanced assessments of their work. If 97% of the contractor’s work is largely very good or excellent, a contractor should not be punished for failures in the other 3% of the work unless the implications of the failure are profound. That was not the case here.

NASA may also point to the wide discretion of the Fee Determination Officer in making a fee determination. Discretion can be abused, especially when the decision cannot be appealed by the contractor--as is the case with award fee determinations. Discretion is not a license for caprice, and it does not appear that the FDO exercised the authority granted him based on thoughtful or diligent work.

Finally, the issues which the FDO pointed to as driving the reduction of HTSI’s performance score were also brought to NASA headquarters. Among the materials that the Committee received is an e-mail in which a senior manager in NASA Headquarter’s Space Communications and Networking office asking Code 450 for briefing materials that can be taken to the “9th floor”--NASA parlance for the Administrator’s and Counsel’s office. There is evidence that the purely critical views on HTSI’s performance in the 11th period were shared with Headquarters. Because the selection authority was retained by Headquarters, this particular element raises other questions about fairness in the competition, but the Committee does not have adequate

a copy sent to Chairman Gordon. Honeywell did raise OCI in their first appeal to GAO, but the matter was ruled to have been raised in an untimely fashion, and GAO refused to take the issue up in substance.

⁴ Acquisitions law typically requires a firm to complain about OCI to GAO within 30 days of learning of circumstances that bring the matter into question. Because HTSI believed there may have been an OCI issue just as the RFP was closing, it would have had to appeal to GAO at the start of the competition. Among the considerations that often keeps a firm from complaining at that point is the strong concern that such a step would create a rift between the firm and the agency that would skew the award process.

documentation to make any conclusions in this regard.⁵

Taken together, NASA's failure to engage OCI in a meaningful way, as required by the FAR, and the damage to HTSI's past performance in response to the FDO's unusual orders tends to undermine the fairness of the SCNS competition. This situation at GSFC and NASA creates at the very least the appearance that the agency is skewing the competition to favor one firm.

The Committee staff has no basis for believing that one bidder would be better than the other in managing the SCNS tasks. The professionals we interviewed from both ITT and HTSI appear to be enormously dedicated and talented. It is of no concern to the Committee which firm wins the contract competition. It is a concern of the Committee that this competition, and all NASA competitions, be fair and be seen to be fair. An agency that willfully engages in conduct that is, or appears to be, prejudicial towards one firm in a competition is an agency that needs to reexamine its commitment to the letter and spirit of the law. Goddard Space Flight Center, and perhaps NASA more broadly, have not honestly examined their conduct nor taken steps to redress it. It is imperative that higher management at the agency very visibly act to sensitize their acquisitions staff to the difficulties of allowing systems engineering firms bidding on management and operations contracts, and act to instruct their FDO and PEB members to adhere to their own evaluation rules--not the ones that rely on the unappealable latitude in the FDO for making a determination, but the ones that are designed to encourage clear communications, clear priority setting and fairness in administration of awards.

⁵ The Subcommittee received just one email in response to our document requests that reveal the connection between Goddard space communications staff and headquarters. The agency did not produce any records from headquarters that would allow this matter to be pinned down. This will be the subject of a subsequent request by the Subcommittee.

Organizational Conflict of Interest

In 2003, Honeywell Technology Solutions Incorporated (HTSI) won the contract to run the space communications network, at that time known as the Near-Earth Network System (NENS). This contract contained a “core” set of responsibilities for managing the space network as well as “indefinite delivery/indefinite quantity” (ID/IQ) ground network management, engineering and development work that would be defined as NASA’s needs emerged. The contract was managed by the Space Communications division at Goddard Space Flight Center (Code 450). Honeywell, or companies it had acquired, had managed the network for over two decades.

Also in 2003, ITT was given an ID/IQ contract to provide systems engineering services to Code 450 on a range of network communications issues, many of which appear to have overlapped with HTSI responsibilities in managing the network and in developing new capabilities.

Systems Engineering and Technology Assessment (SETA) contracts of the kind given to ITT have become more common in recent decades as government agencies have downsized or frozen their employee levels. The result is that federal agencies have had to rely on contractors to provide technical advice on the performance of other contractors or in designing future needs of the agency. Such a role can give a SETA contractor unique insight into the work methods and engineering approaches of existing management and operations contractors. Such a role can also give the SETA contractor enormous influence over how the government perceives the performance of a sitting contractor, how the government approaches and defines future needs, and unique access to the government’s thinking about an upcoming competition.

More material advantages can also come into play. For example, a SETA contractor may end up being asked to do work that essentially becomes a requirement document for the next competition round. Or the SETA contractor may be put in a position to evaluate its own technologies or advise the government that, after a thorough survey, its own corporate services or products are the right ones to meet the government’s needs.

The complex of potential organizational conflict of interest (OCI) for SETA contractors is rich and wide-ranging. The provisions of the Federal Acquisition Regulations (FAR) dealing with organizational conflict of interest point specifically to situations where an applicant provides “management support services... consultant or other professional services... contractor performance of or assistance in technical evaluations... or systems engineering and technical direction work performed by a contractor that does not have an overall contractual responsibility for development or production.”⁶ Contractors who swim in this soup of agency management support require special consideration by the agency if that contractor should seek to bid on

⁶ FAR Subpart 9.502 (b).

underlying management and operations contracts or on production contracts.⁷ Ideally, an agency would address these issues at the time a SETA contract is awarded so that everyone understands what can and cannot be bid on in the future. But barring addressing the issue at that point, the agency must do so at the time of a competition. NASA apparently did not consider the potential of ITT competing for the next round of the NENS contract (ultimately renamed the Space Communications Networks Services contract or SCNS) when it made the 2003 award and thus no prohibition on competing for the M&O contract was included in that 2003 contract.

However, as soon as ITT expressed an interest in bidding on the NENS-follow on contract, the contracting staff at NASA's Goddard Space Flight Center should have done a thorough evaluation of whether an OCI existed. If one did exist, the FAR requires that OCI must be mitigated. The law would support even barring a firm from competing if no other mitigation could guarantee competitive fairness. The relevant section of the Federal Acquisition Regulations (FAR Subpart 9.504) on organization conflict of interest is worth quoting at length:

9.504 Contracting officer responsibilities

(a) Using the general rules, procedures, and examples in this subpart, contracting officers shall analyze planned acquisitions in order to-

(1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and

(2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.

(b) Contracting officers should obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing any necessary solicitation provisions and contract clauses.

(c) Before issuing a solicitation for a contract that may involve a significant potential conflict, the contracting officer shall recommend to the head of the contracting activity a course of action for resolving the conflict.

Review by the Committee staff of the NASA documentary record, as well as an interview of the SCNS' contracting officer, revealed that NASA contracting officials did not undertake any proactive effort to determine if an OCI existed. In fact, the agency's record reflects real ignorance about what would constitute an OCI, and the obligations of the agency and the requirements of officials to insure that competition was fair and open. To the degree that OCI was ever addressed in ITT's work prior to the SCNS contract competition, the agency depended

⁷ This matter has become so significant in contracting in the defense world that Congress passed the 2009 Weapon Systems Acquisition Reform Act. This Act establishes a blanket prohibition on systems engineering contractors being allowed to compete for underlying work. The Pentagon rules on implementing this provision are now driving a move towards divestiture of engineering and management services divisions among large Defense contractors.

entirely on the contractor to self-identify potential conflicts and to self-enforce mitigation plans put in place. **The picture that emerges from examining the SCNS competition is that NASA contracting officials, or at least those at Goddard Space Flight Center, are completely passive in the face of OCI issues both during the duration of contracts and during contract competitions.**

Despite the fact that ITT expressed interest in the SCNS work as early as April 2007 by responding to the agency's Request for Information regarding how to design the scope of the SCNS contract, there is absolutely no evidence that anyone in the NASA contracting operation ever entertained the issue of a potential OCI.⁸ This occurred despite ITT playing a significant and intimate role in helping NASA manage Honeywell in several elements of NENS activity. ITT also played a role in support of NASA's own future plans through specific tasking.⁹ It is beyond the scope of the Committee's review to determine whether there was or was not an OCI, but there is no question that even a casual observer aware of the scope of tasks given ITT would believe that the potential for an OCI existed and no process was followed to make an assessment of the situation.

Determining whether ITT had complied with OCI requirements in carrying out its tasks and whether unmitigated OCI situations had arisen during the course of the ITT contract would have been a significant effort. No such documentation has been provided to the Committee and repeated requests for anything in the record that would demonstrate such an effort have turned up nothing. The record is virtually empty of pre-competition steps to determine whether OCI was an issue and, if so, how it should be mitigated.

The GSFC contracting officer charged with the SCNS acquisition is Geoffrey Sage, and the SCNS acquisition is the largest he has been assigned. Sage claimed to staff that he tackled this issue as one of his first tasks when he took the acquisition effort over in October of 2007. Sage said that soon after he was given the SCNS assignment that he consulted with his office-mate, Jennifer LaMonte, the contracting specialist on the ITT systems engineering contract. Sage told Committee staff that LaMonte assured him there was no potential conflict, and so he determined that the situation was fine for moving forward with a competition.¹⁰

⁸ The Procurement Strategy Meeting Minutes for the Space Communications Network Services (SCNS) Procurement dated December 11, 2007, show not a single question regarding the presence of a systems engineering firm in the expected pool of responders to the RFP. This meeting was hosted by the Headquarters Office of Procurement/Assistant Administrator for Procurement William McNally.

⁹ This is identified as Subtask number 01 (CY03) Rev. One., titled "Space Network Advanced Planning Support," in ITT contracting records. The Task Plan reads in part: "ITT shall provide systems engineering in support of the continuation of NASA's Space Network pre-formulation phase planning currently being studied to satisfy NASA's telecommunications requirements beyond 2010. Under this task, ITT shall continue to provide support of NASA's Future Space Network pre-formulation phase planning and concept development. Specific support areas shall include concept development, technology insertion considerations, and related focused study/assessment activity."

¹⁰ Committee staff interview with Geoffrey Sage, April 7, 2009.

There is no documentation to support this account. As will become apparent in the e-mails quoted below, NASA staff did not appear to discuss OCI until Honeywell raises the question. In the documents provided to the Committee, neither Sage nor LaMonte show the least bit of familiarity with either OCI standards or the substantive content of what ITT had been doing for NASA. Nor is there any mention in those e-mails of any prior conversation between Sage and LaMonte.

In the documentary chain, it is Honeywell, not NASA contracting staff, that raised the specter of OCI by submitting a question as part of the RFP process. On January 30, 2008, Honeywell submitted a question regarding ITT:

What has been done to ensure that the GFSC Code 450 SETA contractor's access to the methods of performing the NENS contract does not create an unmitigated organizational conflict of interest (OCI) (or appearance of an OCI) on the SCNS procurement, including:

- a. by access to the NENS's contractors confidential and/or proprietary information under the Code 450 SETA support contract;
- b. by access to NASA's internal planning and deliberations, including work statements, concerning NENS/SCNS, TDRS K/L and or SNE tasks;
- c. by evaluating the NENS contractor's performance.¹¹

Later that same day, Sage wrote to his supervisor in the GSFC contracting shop, Cynthia Tart:

I got this question from honeywell [sic] late this afternoon. I called honeywell to ensure that I understood the question and I did. ITT had questioned me about this same thing during the site visit and they said they were going to follow up with me and I haven't heard anything from them. I don't think there is much to it in terms of our answer. I think the simple answer is, after I verify that the SETA contractor has the proper clauses, all SETA Contractors have the proper non-disclosure clauses in their contract. I think at least for the time being that is all we can do... Do you have time to talk about this in the morning?¹²

After some exchanges regarding what contract this refers to, Sage wrote to Tart, "If it is only

¹¹ . Kim Quail of Honeywell e-mail to Geoffrey Sage, "SCNS - Questions for Final Solicitation No. NNG08218142R," January 30, 2008 4:39 pm.

¹² Sage to Tart e-mail, "RE: NENS Question," January 30, 2008 8:25 pm.

ITT, I believe it is Jennifer's contract. I'll talk with her first thing in the morning."¹³ He followed that with another note that read, "...I would be real curious to look at the NENS OCI plan."¹⁴ They agreed to meet the next morning to discuss the situation.

At the end of the work day on February 1, Sage wrote to Pamela Werner and Laura Giza of the GSFC counsel's office, Tart and Sandra Marshall at GSFC contract management, and Kevin McCarthy, the contracting officer's technical representative (COTR)¹⁵ on the NENS contract:

I have come across a question from the RFP that I feel requires me to come to you guys for support. **I do not have a real strong background in the OCI arena and am hoping that you will be able to shed some light on this subject and how we need to proceed.... There is the potential that at least a few of the tasks awarded to ITT would have potential for an OCI issue related to SCNS.** I have done a cursory review of the contract and the tasks that have been awarded to ITT under the SETA contract have found that OCI plans have not been submitted either at the contract level or at the task level that I could find. ITT has submitted a request to the NASA Contract Specialist (Jennifer Lamonte) to modify Task 2 of the contract to include an OCI plan. The OCI plan submitted was 'intended to cover all of Task 2 and will be used for any work elements which may have potential for actual or perceived OCI.' I believe Pam [Werner] worked with Jennifer [LaMonte] on reviewing this OCI plan. In talking with Jennifer she indicated that she has sent the modification to incorporate the plan to ITT for signature, but has not received anything back yet. I have attached a copy of the OCI plan that was submitted by ITT for Task 2... The plan does note that if in reviewing materials on this task they are exposed to information which constitutes an unfair competitive advantage OCI (sic). The plan does go on to provide mitigation approaches for that type of OCI.¹⁶ [emphasis added]

The next morning McCarthy wrote back, including two senior managers in the Space Communications office at GSFC (Phil Liebrecht, then Associate Director and Program Manager for Mission Services and Nicholas Chrissotimos, then Associate Director for Exploration and Space Communications):

I am not aware of any instances where ITT has access to NENS's contractors

¹³ Sage to Tart e-mail, January 30, 2008 10:18 pm.

¹⁴ Sage to Tart e-mail, January 30, 2008 10:26 pm.

¹⁵ A COTR stands as an interface between the technical managers who oversee particular tasks and the contracting officer who watches the flow of money on the contract, insures that deliverables are recorded and keeps the legal files on contract performance and compliance.

¹⁶ Sage to Werner, Giza, Tart, Marshall, McCarthy e-mail, "SCNS OCI Question," February 1, 2008 6:43 pm.

confidential and/or proprietary information or evaluated the NENS contractor's performance. Neither ITT, nor any other contractor, participated in the development of any part of the SCNS RFP.¹⁷

Werner responded to Sage's February 1 e-mail on Monday, February 4:

We need more information from Jennifer [LaMonte] at this time I believe. When was the SETA contract awarded? To what extent items a, b, or c in the question are correct? Is there a limitation on future contracting clause in the SETA contract? Also, how many tasks (or is it just task 2) have been issued under the SETA contract pursuant to which the SETA contractor would have access to sensitive information related to NENS or SCNS? I think we'll all need that information first in order to assess how much of a problem we have.¹⁸

and then Werner followed up with,

Geoff- Also, is there language in the RFP on OCI, indicating that proposals would be assessed as acceptable or unacceptable based on OCI issues?¹⁹

Sage was directed by counsel to pursue these questions, and he turned to LaMonte to provide answers. Unfortunately, LaMonte as contract specialist responded that, "I need more information to answer this question." In response to the question of "how many tasks... have been issued under the SETA contract pursuant to which the SETA contractor would have access to sensitive information related to NENS or SCNS?," LaMonte wrote: "I am unsure. The COTR would need to respond to this."²⁰

At this time, Sage was required to travel to the White Sands communications complex and he asked McCarthy to take the lead in pushing forward in the search for answers to Honeywell's questions.²¹ McCarthy wrote late on February 4 to Richard Harris (COTR on the ITT contract) and LaMonte:

¹⁷ McCarthy to Sage, Werner, Giza, Marshall, Tart, Stephen Currier (code 453), Liebrecht, Chrissotimos e-mail, "RE: SCNS OCI Question," February 2, 2008 9:32 am.

¹⁸ Werner to Sage e-mail, "RE: SCNS OCI Question," February 4, 2008 10:14 am.

¹⁹ Werner to Sage e-mail, "RE: SCNS OCI Question," February 4, 2008 11:27 am.

²⁰ LaMonte to Sage e-mail, "RE: SCNS OCI Question," February 4, 2008, 1:18 pm. Contract specialists typically have less experience and training than contract officers and are limited in the dollar value of contracts they can manage.

²¹ Sage to McCarthy e-mail, "RE: SCNS OCI Question," February 4, 2008 10:26 am.

Dick & Jennifer,

...I need to get with the two of you for the ITT contract to gather the answers to these questions for GSFC Chief Counsel's Office. This is urgent.²²

Later that same day (6:09 pm) McCarthy wrote to Harris that, "Jennifer has answered some of the questions and pointed Geoff and I to you for the remainder." McCarthy includes in the forwarded notes all the back-and-forth between counsel and Sage as well as LaMonte's effort to answer Sage's (really GSFC counsel's) questions so that Harris would have the full context of the discussion to that point.²³

There is no evidence that the meeting McCarthy called for ever occurred, but the next day Richard Harris responded in mid-afternoon (2:30 p.m.). Harris, as COTR on the ITT systems engineering contract, is in a better position than either McCarthy or LaMonte to have some insight into what ITT had been doing in its tasks for NASA--and with Honeywell, as a result this e-mail is worth quoting at length:

My reaction to the questions below is they do pertain to the ITT Contract as it currently exist [sic] since **the purpose of the contract is to provide independent SE [systems engineering] oversight on CODE 450's behalf across the Networks...** But does such ITT Network access as the ITT Engineering Support Contractor present conflicts? Someone with knowledge of both ITT Network support and NENS contract should take that question. For me with only a view of the ITT Contract as COTR the answer is possibly yes but I'm not in the position to make that final determination. **That was always going to be a question if ITT ever decided [sp] to bid the Network Support Contract.** That concern is specifically reflected in questions a, b, and c and are actually similar to bidder concerns when ITT rebid the current SE Support Contract. I might have concerns if I read the ITT SE Support SOW and had knowledge of the current ITT engineering support Tasks but that is a Network contract question and is beyond my position or evaluation capability from the Network Contract side. [emphasis added]²⁴

By the time he saw this response, McCarthy has already begun to draft a response to the Honeywell questions. McCarthy declared in an e-mail to Sage at 4:07 pm that same afternoon

²² McCarthy to Harris (450.1), LaMonte, cc to Christine Hinkle, Sandra Marshall (210), Chrissotimos, Liebrecht, Sage, Campanella (450), Greatorex (450) e-mail, "FW: SCNS OCI Question," February 4, 2008, 5:38 pm.

²³ McCarthy to Harris with cc to Hinkle, Marshall, Liebrecht, Sage, Chrissotimos, Campanella, Greatorex, and LaMonte e-mail, "FW: SCNS OCI Question," February 4, 2008, 6:09 pm.

²⁴ Harris to LaMonte e-mail, "RE: SCNS OCI Question," February 5, 2008, 2:30 pm.

that the Harris note “does not help me much.” He also indicates that Jennifer LaMonte will send him five task statements of work from the ITT contract (there is no evidence that happened by the time McCarthy drafted a response to the Honeywell questions).²⁵

Sage responded to McCarthy at 4:17 pm,

I spoke with Ted Sobchak out here [White Sands] and he provided some insight into the support that ITT is providing for SNE. Some things he told I was very comfortable with others no [sp] so much.²⁶

McCarthy responded to Sage just eight minutes later (4:25 pm): **“Please call me in the office.”** [emphasis added]²⁷

There is no further e-mail evidence of what was discussed in that call between Sage and McCarthy, or if it happened.²⁸ The next e-mail, sent less than an hour after the “call me” note (at 5:21 pm), is a draft response to the Honeywell questions that constitutes a complete repudiation of concerns surrounding potential OCI:

DRAFT Response for Discussion

In answer to a:

“The Government is not aware of any case where NENS Task Implementation Plans, Cost Proposals, or any other confidential and/or proprietary informatino have been shared with any contractor.”

In answer to b:

The NENS contract SOW [Statement of Work] and all NENS ID/IQ task SOWs are available to potential SCNS offerors through the <http://nasatomsnens/URL>. This information has been posted previously in the SCNS Procurement Library.

No contractor support was utilized in the development of the SCNS RFP.

It appear that the entire TDRS K/L Project is at the Kick-off meeting with Boeing. Maybe Sandy can contact Michelle Rook or knows the answer herself.

²⁵ Harris to Sage and Marshall e-mail, “RE: SCNS OCI Question,” February 5, 2008, 4:07 pm.

²⁶ Sage to McCarthy and Marshall e-mail, “RE: SCNS OCI Question,” February 5, 2008, 4:17 pm.

²⁷ McCarthy to Sage and Marshall e-mail, “RE: SCNS OCI Question,” February 5, 2008, 4:25 pm.

²⁸ Sage seems to think the phone call occurred, but he told staff that he could not remember what McCarthy wanted to discuss in that call or what about Sobchak’s statements on February 5 made him uncomfortable. Sage Interview, April 7, 2009.

Ted to write answer on SNE

In answer to c:

All evaluations of NENS contractor performance has been by civil servants in accordance with 450-MGMT-0003A (or the prior version 450-MGMT-003), Performance Evaluation Plan for Near Earth Networks Services, Contract NNG04DA00C.²⁹

No relevant responses from the next couple of days of e-mail traffic was found in documents provided to the Committee. No discussion. No demurrals. No evidence that task monitors who would be more intimately familiar with the actual work of ITT on Honeywell contracts ever reviewed this or weighed in. Nor is there any clarification regarding the OCI plans either in place or proposed among ITT's tasks. However, McCarthy's proposed response appears to become a draft that NASA staff then begin working from to polish up a final set of responses.

On February 7, 2008, Pam Werner wrote to Sage, ccing Giza (GSFC GC office), Tart and McCarthy:

I have attached a copy of a GAO opinion for your information. In this case, a firm protested a procurement based on their allegation that another offeror had an impermissible conflict of interest.... The GAO denied the protest. There are two important points to take from the case. The GAO requires "substantial facts and hard evidence" to establish a conflict, not "mere inference or suspicion." The GAO has also state that "we will not overturn an agency's determination as to whether an offeror or potential offeror has a conflict of interest except where it is shown to be unreasonable.

When you are back in the office next week, lets [sic] schedule a meeting to discuss our next moves.³⁰

NASA used this decision to avoid its obligations to review and mitigate potential OCIs as required under the FAR, section 9.5. NASA also used this decision to shift onto the shoulders of Honeywell the burden to provide hard evidence that the agency failed to carry out its responsibilities.

Later that same day (February 7) Tart seems to misunderstand the thrust of Werner's e-mail

²⁹ McCarthy to Sage with cc to Marshall, LaMonte, Harris, "DRAFT Response for Discussion," February 5, 2008, 5:21 pm.

³⁰ Werner to Sage with cc to Giza, Tart, McCarthy, "RE: SCNS OCI Question," with an attachment identified as "Snell OCI.doc," February 7, 2008, 11:11 am.

because she sends a copy on to Marshall with an e-mail note that reads: “FYI... wanted to make sure you saw this. Sounds like we still need to research the three areas she mentions? C.”³¹

Marshall responded,

I think we are coming to closure on the answers to all three questions... and our determination is that we are clean in all areas. We are going to draft responses and have Pam review to make sure our comments reflect the effort we put in to determining there is no conflict. They aren’t real detailed, ex. ‘Only Government personnel evaluate the contractor’s performance on NENS.’ but there isn’t a lot to say.³²

The next week, Sage returned to GSFC from his trip to White Sands and wrote to Werner to ask for a meeting on the issues raised by Honeywell:

The project and I have spent a considerable amount of time researching this issue as I know you have as well. Based on the input that I have received from the project, you, and my research **I am confident that without “substantial facts and hard evidence” being produced, it does not appear that we have an OCI issue.**³³ [emphasis added]

The next few days were marked by legal reviews, word-smithing and (apparently) reviews of the ITT tasks and contract language to make sure that there was no written direction that they would “evaluate” Honeywell as part of the contract records.³⁴ This review exercise appears to be less about the substance of what ITT actually did for NASA and more about making sure that Honeywell couldn’t find obvious “substantial facts and hard evidence.” By February 14, 2008, answers to Honeywell’s three questions were finalized. The substance of the agency’s position was that there was no OCI resulting from ITT’s participation in the SCNS competition.

³¹ Sage to Marshall e-mail, “RE: SCNS OCI Question,” February 7, 2008, 1:52 pm.

³² Marshall to Tart with cc to Sage e-mail, “RE: SCNS OCI Question,” February 7, 2008, 2:16 pm.

³³ Sage to Werner with cc to Giza, Tart, McCarthy, and Marshall email, “RE: SCNS OCI Question,” February 11, 2008, 3:27 pm.

³⁴ Sage writes to Werner, and cc’s Marshall, McCarthy, Wilson, Tart, and Giza on February 13, 2008 in “RE: SCNS OCI Question,” thanking her for the meeting that morning. He then goes on to write: “I also looked at the ITT contract and it does incorporate by reference NFS clause 1852.209-71 Limitation of Future Contracting (DEC 1988). Based on the file on Jennifer’s desk it also does not appear that ITT has signed Mod 36 on Task 2 which is suppose [sic] to incorporate the OCI plan for that task. I also went back through the SOW for the overall ITT contract and no where does it provide requirements for evaluations of contractor performance under the NENS contract or any contract for that matter. If you would like, I can read through each of the task [sic] to confirm that this requirement did not slip in somehow into a task, though I would expect that it is highly unlikely.”

FAR Subpart 9.5 suggests that the time for NASA to tackle an evaluation of OCI risk regarding ITT for future systems management contracts was when the systems engineering contract was first awarded. But even failing to make that evaluation of NASA's in 2003, with appropriate limits then put in place on future bidding on the underlying system management contract, it would have been appropriate to do such an evaluation at the time of the SCNS contract competition being launched. As Richard Harris wrote regarding whether ITT had an OCI or not requiring mitigation, it "was always going to be a question if ITT ever decided [sp] to bid the Network Support Contract." The level of effort that Harris describes to make an honest determination is never engaged in by the agency. In fact, NASA documents suggest that the COTR on the NENS contract, Kevin McCarthy had crafted answers in the negative to Honeywell's questions in the course of two day's work and with incomplete information. And this approach of giving answers that were "not very detailed," as Marshall put it, was confirmed by counsel's guidance and their interpretation of GAO findings on past OCI matters.

This is not a model of how agencies are to deal with OCI when a systems engineering firm is considering bidding on the underlying management contract. If NASA GSFC acquisitions staff had their way, the whole issue would never have been engaged, even in the superficial manner required to dispense with Honeywell's question. Having met the legal hurdle to make the question go away, GSFC acquisitions marched ahead to award the SCNS contract. On October 8, 2008, the contract was awarded to ITT.

NASA Awards of SCNS and HTSI Appeals to GAO

The Comptroller General of the GAO oversees the federal contract bid protest process. Bidders that believe an agency has made an award in violation of the FAR may protest that award. According to the Congressional Research Service, approximately 5% of bid protests are sustained by GAO. During the protest period, the contract award is stayed until GAO has acted on the protest.³⁵

On October 20, 2008 Honeywell protested the bid award on SCNS to the Comptroller General on six grounds, including OCI. On OCI, GAO ruled that the complaint was not timely filed and refused to make a decision based on the substance of that issue.³⁶ However, GAO sustained one

³⁵ Schwartz, Moshe and Kate M. Manuel, "GAO Bid Protests: Trends, Analysis, and Options for Congress, February 11, 2009, pp. 10 and 11. 5% represents the average of all bid protests sustained by GAO over the period FY2001 through FY2008.

³⁶ "Protest of Honeywell Technology Solutions, Inc. Under National Aeronautics and Space Administration Solicitation No. NNG08218142R," Jenner and Block, Counsel for Protester, Honeywell Technology Solutions Incorporated, filed October 20, 2008. GAO ruling on OCI was issued on January 27, 2009, "Decision Matter of: Honeywell Technology Solutions Inc File: B-400771, B-400771.2."

of HTSI's complaints: that NASA's evaluation of ITT's past performance was not reasonable or consistent with the stated evaluation criteria. NASA agreed to reevaluate the past performance of both bidders. Since the two bids were already scored very closely, this one change could have turned out to shift the award. The chart below, which is drawn from the GAO opinion, shows how close the firms' bids were. While the chart does not reveal the dollars involved in the two bids, it is known that ITT had a bid that was slightly higher-cost.

Honeywell and ITT Adjectival Scores on SCNS, October 2008

Factor	Honeywell	ITT
Mission Suitability	Very Good	Very Good
Past Performance	Very Good	Excellent
Total Evaluated Cost	\$(DELETED)	\$ (DELETED)

On April 7, 2009 NASA again awarded the SCNS contract to ITT. By April 24, HTSI had filed another protest with GAO which called into question NASA's handling of the past performance matter. On June 25, GAO held a hearing that involved an "outcome prediction" and "advised the parties that NASA's reevaluation of ITT's past performance was not reasonable or consistent with the stated evaluation criteria" because it relied too heavily on ITT's performance under the systems engineering contract with Code 450. This contract, only 4% the size of the SCNS contract, was not relevant as defined by the RFP because it was not similar in size, content or complexity to the requirements of SCNS. On July 2, NASA announced corrective action that would see the agency move forward in gathering new information on past performance and reevaluating that portion of the two firms' bids. As a result of this action by NASA, GAO dismissed the Honeywell protest as "academic."³⁷

Given how close the scoring for the two bids had been, significantly diminishing ITT's score on past performance, as was implied by GAO's comments, would appear to give an advantage to Honeywell in the competition. It was difficult to see how ITT could win the contract unless something happened to Honeywell's past performance evaluation to push it down into the same range as ITT's, but with Honeywell's history of strong performance scores under the NENS contract, that seemed unlikely.

³⁷ The quote in this paragraph and this discussion draw from GAO's "Decision Matter of: Honeywell Technology Solutions, Inc. File: B-400771.6, November 23, 2009," See especially the "Background" discussion.

NASA Reduces Honeywell's Past Performance Score for "Period 11"

While the appeals and re-competitions were unfolding after October 8, 2008, Honeywell continued to manage the NENS contract. In the months after their extension on NENS, Honeywell came under fire from GSFC for problems with managing three technical development efforts. These projects were small, representing just 3% of HTSI's work by value, and none of them were mission critical. Coincidentally, all appear to be projects for which ITT was providing systems engineering work. By the time NASA had announced that ITT had won the award for the second time on April 8, 2009, NASA was holding regular meetings among managers at GSFC with HTSI managers to discuss these issues. By late-Spring, NASA was also beginning to communicate concerns to Honeywell about the retention of employees.

Subsequent to the April 24 HTSI protest being filed with GAO, but before the GAO hearing, a movement began in the Code 452 Space Network Project Office to see that a management letter would be sent to Honeywell putting them on notice that their work on the User Services Access (USA), User Services Subsystem Replacement project (USSR), and the Space Network Expansion-East planning and definition task, and their staff retention were all being mismanaged. The Committee does not seem to have all the records regarding the origins of this effort, but by early May Code 452 staff were working on a draft of such a letter that would demand a recovery plan from HTSI.

On May 26, one month after HTSI had filed their second appeal of the SCNS award with GAO, Ted Sobchak sent an e-mail to Tom Gitlin (both of whom were in Code 452). Sobchak wrote:

Spoke with the C.O. [contracting officer, this should be Donna Broderick] about the most recent version of the letter (rev. 2), it was well received. Looks like some of the internal skids have been greased. We agreed to talk late on Wednesday afternoon to status any questions/changes they have, and to discuss a schedule for getting it out the door. I feel like we are getting closer....³⁸

There is no record of how or who had greased internal skids for such a serious letter.

A little over a week later, Sobchak sent a note to Nate Wright (NENS COTR) and cc'd Pietro Campanella (GSFC Business Manager), Tom Gitlin, Donna Broderick, Keiji Tasaki (Code 452), and Roger Flaherty:

³⁸ Ted Sobchak to Thomas Gitlin e-mail, May 26, 2009, "Spoke with C.O. about letter."

At the pre-MSR [pre-Monthly Status Review] this morning Dave Scheve made lengthy comments and inquired about the status of the letter being sent to HTSI that would describe the inadequate performance of NENS on several areas. Dave was quite clear that the letter needed to be sent "ASAP", that the letter needed to contain "teethy language", and that he wanted to be notified if contracts or legal was impeding progress to send the letter.³⁹

Scheve was the Deputy Director for Flight Operations under George Morrow. These notes suggest that management at Goddard wanted action taken on Honeywell and they were focused exclusively on just a couple of items as well as the perceived drain of personnel. The management letter is sent out on June 9, 2009. By June 17, HTSI had briefed NASA on their plan for satisfying NASA on USA, USSR, SNE-E and personnel. Honeywell did undertake a series of steps designed to get the right skill sets in place on these projects as well as accelerating retention and hiring efforts. Honeywell had a huge incentive to spend money on these efforts to satisfy the customer since they still hoped to win the SCNS competition.

In light of the Task Monitor scores and observations recorded in July of 2009--just a month after the management letter is sent--it is hard to understand why the SNE-E upgrade and USA/USSR received so much high level attention.⁴⁰ As will be discussed in the Performance Evaluation section below, the SNE-E upgrade ended Period 11 largely in good shape and the problems that were encountered were at least in good measure a result of NASA and the customer being slow to settle on direction to the contractor. USSR ends Period 11 in good condition with no show-stopper issues and a solid technical score. Only USA is viewed as a project that is simply not making progress, but even this item provokes from the engineers at NASA a work-around that could mitigate the impact of lags on this technical development task without impacting other operations.

The loss of personnel issue is more difficult to assess. NASA, at least at Goddard, seems to have an institutional perspective that the contracting personnel are "their" people and the contractor's management team is expendable.⁴¹ NASA believed that too many experienced HTSI staff were

³⁹ Sobchak to Wright, cc to Caompanella, Gitlin, Broderick, Tasaki, Flaherty, "FW: Letter to HTSI on performance Issues," June 4, 2009.

⁴⁰ It appears that ITT was providing engineering oversight and assessment of HTSI's work in all these controversial areas for Code 452.

⁴¹ Both Honeywell officials and officials from ManTech International confirmed this impression. The CEO of ManTech is very articulate on this issue and has shared documentation relating to NASA's efforts to help the incoming contractor "capture" his employees. In the HTSI case, a NASA staffer complained inside the agency about a Honeywell retention bonus system in which approximately two dozen of the most highly skilled staff were promised a bonus if they would stay with Honeywell through the remainder of the NENS contract and for an undisclosed period of time afterwards. Nate Wright wrote in his August 15, 2009 Headquarters briefing, "retention of these highly skilled employees by HTSI after SCNS award poses additional impacts and essentially excludes these valued employees from the incoming capture process." NENS to SCNS Contract Delay Impacts, August 15,

slipping away due to changes in Honeywell corporate policy on medical insurance. Internally at NASA there were some who felt the uncertainty surrounding who would win the SCNS contract was adding to workforce erosion, and HTSI was blamed for this.⁴² And it was not just HTSI staff that NASA complained about losing, but also the loss of experienced staff at White Sands who worked for an HTSI subcontractor, General Dynamics.

Honeywell promised NASA in their “recovery plan” that they would accelerate hiring and be even more aggressive in retention policies. However, the company also disputes the allegations that there was significant loss of staff and has produced documents to the Committee purporting to show that its vacancies were on a par with past periods. It also noted that NASA’s own conduct created an environment where “poaching” of staff or movement of General Dynamics’ staff to other NASA or Air Force projects created some personnel instability. HTSI provided the Committee with a document that claims that “NASA Moves Existing NENS Work to Another non-NENS Contractor” and that there was a “Non-NENS contractor advertising for personnel with 15-20 years of experience with Space and/or Ground Network.”⁴³

While NASA blamed HTSI for the perceived loss of key staff and HTSI blamed NASA for creating conditions that were making it tough to keep staff, there was no obvious impact in Period 11 on Honeywell’s performance under the contract. In other words, while there were concerns that losses, if not addressed, could produce problems down the road, there is no evidence that a single mission critical assignment given Honeywell was compromised in Period 11 by lack of staff or lack of experienced staff.

Within a week of the recovery plan being briefed to NASA, GAO had held its hearing and informed NASA that its past performance evaluation in the second SCNS award was improper. By July 2 the agency had voluntarily withdrawn the award and promised that they would reevaluate past performance yet again. Typically, Honeywell received a rating and award fee every six months. However, the uncertainties around the NENS to SCNS transition led NASA to extend the performance period to nine months--from October 9, 2008 to July 8, 2009. The performance evaluations for HTSI under the NENS contract were being filled out during the weeks after July 8, 2009. By August, acquisitions staff at GSFC were trying to specifically scope a new approach to past performance for the SCNS competition that would satisfy GAO. Also in August, the Performance Evaluation Board on the NENS contract finishes its work to assign Honeywell a performance score. In the wake of GAO’s advice on the SCNS contract, NASA management took unusual steps that radically downgraded Honeywell performance for that 11th period.

2009, p. 2.

⁴² “NENS to SCNS Contract Delay Impacts,” August 15, 2009. These charts were put together by Nate Wright to be for a Headquarters briefing about the situation on the NENS contract. They will be discussed again below.

⁴³ Document provided by HTSI. HTSI claims that it is part of a package of material that was produced to be shared with NASA top managers.

Performance evaluations of award fees are supposed to be rule-bound activities. For NENS there are three documents that need to be considered in understanding how the contractor's performance is to be evaluated: NASA's "Award Fee Contracting Guide," the Performance Evaluation Plan for NENS, and the Areas of Emphasis letters issued to Honeywell that are intended to specifically focus the contractor's energy and resources.

NASA has issued an "Award Fee Contracting Guide" that defines when the agency should use award fee contracts, as opposed to fixed fee for service or other contracting vehicles. It also establishes standards for evaluating performance and how to develop a performance plan. The guide states that award fee for services contracts should be designed to conform with the goals of performance based contracting--an approach that manages for results, not effort or process. The goal in those contracts is to "contain clearly defined performance requirements, easily understood performance standards, and an objective incentive mechanism (where possible) [that] will provide contractors with a clearer understanding of the Government's expectations, thereby facilitating enhanced contractor performance and reducing the chance of disputes."⁴⁴

Factors that lead an agency to choose a cost plus award fee contract are: (1) when the Government is unsure how to evaluate the risk of the service, as in a research acquisition, or (2) the Government desires flexibility in the tasks it wishes to assign the contractor. While the total award fee is capped, but variable depending upon meeting the incentives put in place for the contractor to meet the government's goals. Those goals should be expressed in a detailed performance evaluation plan shared with the contractor. The plan should "indicate the relative priorities assigned to the various performance areas and evaluation factors and subfactors. This guides the contractor in using the proper importance to factors when faced with trade offs."⁴⁵ The examples used in the "Guide" for evaluation factors include Technical, Project Management and Cost Control.⁴⁶

In January of 2009, Kevin McCarthy sent out a note about using the Task Order Monitoring System (TOMS) to evaluate NENS performance in the extended, 11th performance period. The note went to a long list of players, some of whom were prominent in the SCNS award competition: Geoffrey Sage (CO for the SCNS award), Mary Esfandiari (Chair of the PEB for NENS), Tom Gitlin (Code 452), Pietro Campenella (business manager, GSFC), Roger Clason, Ted Sobchak (Code 452), Maria McNamee (procurement manager, GSFC) and Nate Wright (newly assigned as COTR on NENS). Attached to the e-mail was the performance evaluation plan with a note that any changes are "supposed to be made before the period starts and will have to be approved by Val Burr [associate director of acquisition] and George Morrow [GSFC

⁴⁴ Award Fee Contracting Guide, NASA, June 27, 2001, p. 3.

⁴⁵ Award Fee Guide, p. 15.

⁴⁶ Award Fee Guide, pp. 15-16.

Director of Flight Operations and Fee Determination Official on NENS).”(emphasis added) The note mentions that the “areas of emphasis” letters that had gone to Honeywell would have to go to the participants in the evaluation process.⁴⁷

The Performance Evaluation Plan (PEP) attached to the e-mail was dated October 9, 2006 with an expiration date of October 8, 2008, the nominal end of the NENS contract. It was signed by Burr, as well as Arthur Obenschain as the Fee Determination Official at the time as the Director of Flight Projects (now Deputy Director of GSFC), and Curtis Emerson, then the COTR.⁴⁸ The Plan established an organizational structure for award fee administration. The procurement officer (Burr) must approve any significant or substantive changes to the plan. The plan also describes the responsibilities of the Fee Determination Official (George Morrow in the 11th award fee period) including:

1. Establish the Performance Evaluation Board;
2. Consider the PEB report for each evaluation period and discuss it with the PEB chair and, if appropriate, with others such as the contractor;
3. Determine the Award Fee earned and payable for each evaluation period as addressed in Section 4 and ensure that the amount and percentage of the award fee earned is commensurate with the contractor’s performance. Any variance between the PEB recommendation and the FDO determination must be justified and documented in the official contract file;
5. Make significant and substantive changes to this plan as addressed in Section 5, as appropriate;⁴⁹

Section 4 of the Plan specifies the “method for determining award fee.” It stated that, “Although award fee contracts are subjective in nature, the Government generally attempts to utilize objective and quantifiable measures to the greatest extent possible as a guide in assessing the contractor’s performance.”⁵⁰ It goes on to delineate the methods for monitoring, evaluating and assessing contractor performance, and that monitors with appropriate expertise are assigned for each performance evaluation factor to be evaluated under the contract.”⁵¹

⁴⁷ Not clear why this goes out in January. McCarthy seems to be sending it around to make sure everyone involved knew that the TOMS system was going to be used to record Task Monitors assessments of HTSI’s performance. It may be that in January it had not been clarified that the performance period on the NENS 11 period would be extended from 6 months to 9 months. This may also be part of his effort to transition NENS COTR responsibilities to Nate Wright, who replaces McCarthy (McCarthy is COTR on the SCNS competition).

⁴⁸ Performance Evaluation Plan for Near Earth Networks Services, Contract NNG04DA00C, Revision A, Effective Date: October 9, 2006; Expiration Date: October 8, 2008, Goddard Space Flight Center, Greenbelt, Maryland, 450-MGMT-0003A. The general authorities, responsibilities and guidance in the PEP is derived verbatim from the Award Fee Contracting Guide.

⁴⁹ PEP for NENS, p. 3.

⁵⁰ PEP for NENS, p. 7.

⁵¹ PEP for NENS, p. 7.

Information coming out of the monitors' reports then feed to the Performance Evaluation Board (PEB). "Promptly after the end of each evaluation period, the PEB will meet to consider all the performance information it has obtained. At the meeting, the PEB will summarize its preliminary findings and recommendations for inclusion in the Performance Evaluation Board letter."⁵² "The PEB Chairperson, with the help of the COTR and in coordination with the CO [contracting officer], will prepare the Performance Evaluation Board letter (i.e., draft FDO letter) for the period, which will be reviewed by the PEB Chairperson and then submitted to the FDO for use in determining the award fee earned."⁵³ "The FDO will consider the recommendations of the PEB, information provided by the contractor, if any, and any other pertinent information in determining the amount of the award fee to be paid for the period. The FDO's determination of the amount of the award fee earned and the basis for this determination will be stated in the award fee letter."⁵⁴

Appendix B in the Performance Plan then laid out "performance areas and evaluation criteria." It offers three factors--Program/Business Management, Technical/Schedule Performance, and Cost Performance--as areas for rating contractor performance. Each is weighted differently: Program Management weighted at 15%, Cost Performance at 25% and Technical Performance at 60%. At approximately eight pages in length, Appendix B is quite detailed describing how each factor should be evaluated.⁵⁵

Part 3 notes that "The percentage weights indicated in Appendix B... are quantifying devices. Their sole purpose is to provide guidance in arriving at a general assessment of the amount of award fee earned. In no way do they imply arithmetical precision to any judgmental determination of the contractor's overall performance and amount of award fee earned."⁵⁶ This language, as well as the guidance that an FDO may deviate from the PEB's recommendations so long as those are "justified and documented in the contract file," make it clear that award fees are subjective in nature.⁵⁷ However, the Award Fee Contracting Guide states that it is the FDO's responsibility to "ensure that the amount and percentage of award fee earned accurately reflects the contractor's performance."⁵⁸

According to the PEP, the contractor is also to receive "Area of Emphasis" letters from the agency that clarify what the agency most wants to see accomplished during the period.⁵⁹ The

⁵² PEP for NENS, p. 7.

⁵³ PEP for NENS, p. 8.

⁵⁴ PEP for NENS, p. 8.

⁵⁵ PEP for NENS, Appendix B, B1-B8.

⁵⁶ PEP for NENS, p. 6.

⁵⁷ PEP for NENS, p. 4.

⁵⁸ Award Fee Contracting Guide, p. 9.

⁵⁹ PEP for NENS, p. B-1.

letters are supposed to be sent before the beginning of a period to help focus the contractor's resources during the period. For the 11th evaluation period, NASA issued three letters to HTSI: the first was sent in November 2008, a second was issued in January of 2009 and the third in March of 2009. There were only very small changes among the letters. Items are routinely listed in rough order of importance to the agency to communicate to the contractor how the agency intends to prioritize the work in evaluating the contractor's efforts.⁶⁰ The list of ten items as included in the March letter is represented in the table below.

⁶⁰ The Award Fee Contracting Guide addresses evaluation factors in the context of the PEP, but it reads, "list the primary evaluation factors in descending order of importance," Section 3.4.3 "Weighting of Evaluation Factors." A person long experience in managing contracts for the Department of Defense confirms that communications with a contractor are built around listing the most important items first and less important items later.

Areas of Emphasis for HTSI According to NASA

1. Provide safe and efficient operations of the Space Network fleet (TDRS-1 through TDRS-10).
2. Provide Space Network and Ground Network critical support to Human Space Flight missions, Special Projects and Missions, Expendable Launch Vehicle support, spacecraft launch and early orbit operations. GSFC's goal for critical support is that all of the missions' requirements are met with 100% service proficiency.
3. Execute the phase-out plan fully to ensure a seamless transition to the follow-on contract. Deliver phase-out items and data requested by CO.
4. Provide adequate staffing and skill levels to provide effective and efficient performance-based services under the Core and the ID/IQ requirements.
5. Successfully complete all tasks, milestones and deliverables associated with the TDRS K/L effort.
6. Successfully test and integrate new missions with the supporting networks. Participate in internal and external reviews as required, demonstrating readiness to provide NENS support as specified in each customer's mission requirements documentation. In this evaluations period, special emphasis will be placed upon the following Space Shuttle Missions: IBEX, LRO, TacSat-3, Ares I-X, OCO, NOAA-N Prime, GOES-O and other scheduled payload launches of Expendable Launch Vehicles requiring significant pre-mission support.
7. Successfully complete all tasks, milestones and deliverables associated with Space Network Expansion (SNE), and Space Network Ground Segment Sustainment (SGSS) efforts.
8. Conduct a successful WS1 delta operational readiness review and transition WS1 to operational use.
<p>9. Continue vigilant focus on missions and operational support areas.</p> <p style="padding-left: 40px;">Mission support schedules, as measured from PSLA development start to NOSP NIMO CCB approval, shall not be delayed by more than 10% of the total duration from the current "approved" baselined schedule.</p> <p style="padding-left: 40px;">Individual mission development milestones (PSLA, NRR, NRD, NOSP, MORR, etc.) shall not be delayed by more than 14 days from the current "approved" baselined schedule.</p> <p style="padding-left: 40px;">Complete 100% of the mission documentation for at least 85% of the missions schedule to conduct a MORR during this period.</p>
10. Special emphasis will be placed on the cost performance, as well as timely and accurate updates to EAC's for Core and ID/IQ efforts with associated planned vs. actual cost variance.

The skein of rules represented in the agency's Award Fee Contracting Guide, the Program Evaluation Plan for NENS and the Areas of Emphasis Letters put in place a process for using the award fee contract to get the best possible performance out of a contractor. **The interlocking reviews tied to the Performance Evaluation Plan and the Areas of Emphasis letters, as well as the ongoing communications with the contractor, should guarantee a good fit between the PEB's work, the FDO's expectations and the contractor's ultimate fee. In the case of period 11 on the NENS contract, the system broke down in a very fundamental way.**

The Performance Evaluation Board (PEB) began working in July of 2009 to gather performance scores for the October 8, 2008 to July 8, 2009 period of Honeywell's performance on the NENS contract. The future of the follow-on contract was under a cloud due to the GAO decision and NASA's own acknowledgement of error. As the task monitors submitted their scores, and the formula for a cumulative performance under the contract began to play out, it was clear that Honeywell was performing in the same range as it had for several past periods with a proposed consolidated performance score of 86. The table below, based on information provided the Committee by Honeywell and NASA, shows scores for the first 10 periods of the NENS contract. The original PEB-proposed NASA Period 11 comes from internal NASA documentation.

HTSI NENS PERFORMANCE SCORES

Award Fee Period	Period of Performance	Program/Business Mgmt. Score	Technical Performance Schedule Score	Cost Performance Score	Consolidated Performance Score
1	10/9/03-4/8/04	73	87	74	80
2	4/9/04-10/8/04	77	88	85	84
3	10/9/04-4/8/05	85	86	88	86
4	4/9/05-10/8/05	89	90	89	90
5	10/9/05-4/8/06	90	88	89	89
6	4/9/06-10/8/06	73	89	88	85
7	10/9/06-4/08/07	89	91	90	90
8	4/9/07-10/8/07	82	89	89	88
9	10/9/07-4/8/08	85	88	91	88
10	4/9/08-10/8/08	85	90	92	90
11 Proposed	10/9/08-7/8/09	81	86	90	86

NASA often relies on adjectival ratings in place of or as a supplement to firm scores. The PEP for the NENS contract describes scores of 0-60 as “poor/unsatisfactory; 61-70 represents “satisfactory” performance; 71-80 represents “good” performance; 81-90 represents “very good” performance; 91-100 represents “excellent” performance. Honeywell’s proposed 86 describes “Very Good” performance. The PEP for NENS goes on to define very good as: “Very effective performance, fully responsive to contract requirements; contract requirements accomplished in a timely, efficient, and economical manner for the most part; only minor deficiencies.” The consolidated performance score of 86 was contained in the PEB proposed draft letter of August 14, 2009. That letter also had breakdowns by areas: on technical/schedule performance Honeywell received 86 percent, for program and business management they were rated at 81 percent, and for cost performance they received a 90 percent.⁶¹

The heart of the management and operations contract was keeping the Space and Ground Networks operations, with hard performance metrics for “availability” of the network and for support of specific NASA missions as well as the missions of other client agencies. For Space Network operations and maintenance Honeywell received a score of 91; for Ground Network operations and maintenance Honeywell received a 90.37 score. These evaluations are largely built on objective metrics regarding the availability of the network.

A review of the task monitors’ observations reveals lots of very positive language commending Honeywell for its performance in one difficult task after another. For example in “Special Projects and Missions” Honeywell received a 97. The task monitor wrote (in part):

During this evaluation period, the contractor performance has been exceptional. This level of performance is a continuation of past evaluation periods and has established the contractor management and operations team responsible for SP&M as one of the best in my experience... Successfully integrated STS/ISS/SP&M schedules including the STS-125 HST Repair Mission. This effort required near continuous coordination, and negotiation within the communities to ensure equitable distribution of resources...⁶²

For “Human Space Flight Support” Honeywell received a 95 for supporting 6 shuttle missions including the STS-400 rescue mission. About this performance the task monitor wrote (in part):

⁶¹ The draft letter is attached to an e-mail from Nathaniel Wright (GSFC-4500) to Thomas Gitlin (GSFC-4520) dated August 24, 2009. The file is entitled, “NENS Award Fee Letter Period 11_8 14 09 final.docx . The PEP Appendix C. Award Fee Grading Table shows the relationship of adjectival ratings to performance points and descriptions, p. C-1.

⁶² “Special Projects and Missions” task monitor comments in TOMS for NENS PEB Performance Period 11.

The Operations team continues to maintain a level of support that can best be described as excellent... Launch slips added significantly to the workload of the OPS team. The OPS team reacted to these schedule changes in a very prompt and professional manner, rescheduling affected activities, and supported all milestones and requirements, leading to excellent mission support. Of special mention is the outstanding effort by the Task Lead and the Network Manager, and the entire operations team for that matter, in coordinating Integrated Network efforts in preparing for the launch of STS-125, the HST servicing mission with its unique mission requirements, and the possible launch of the STS-400 rescue mission. This was an extraordinary effort!... Summary: The contractor's overall efforts in the area of realtime mission operations and the technical planning efforts in support of realtime operations (specifically the STS-400 effort) and advanced mission planning have been outstanding and are the basis for this evaluation being scored in the "excellent" range.⁶³

Both Special Projects and Missions and Human Spaceflight Support were listed as elements in the 2nd highest priority for Honeywell in their Areas of Emphasis letter for Period 11. Reading through the comments by task monitors on Honeywell's performance shows a wide range of observations. Even the performance issues that were rated in the "excellent" range often have notes of caution or examples of less than impressive performance. However, the task monitors appear to balance those concerns against the contractor's performance overall in the task area, just as the NASA Award Fee Guide suggests they should. The table below reproduces the scores for 47 tasks recorded in the PEB 11 period report made available to PEB members.

Task Monitor Scores for HTSI NENS Performance in Period 11

Task Number/Description	Task Monitor Score
1 Suborbital Services Task	90
2 Second Guam Antenna System (SGAS)	65
3 Customer Integration and Test	94
4 Networks Loading & Modeling	98
5 Ground Network Evolution	95
6 Ground Network Orbital Services	88
8 MILA/PDL	94
10 Communications Center	85
12 EDOS Ground Station Interface Facilities & ERPS Ground Station Interface Processors Operations Support at the Space and Ground Networks	93

⁶³ "Human Space Flight Support" task monitor comments in TOMS for NENS PEB Performance Period 11.

13 Special Projects & Missions	97
15 Human Space Flight Support	95
17 Robotics and ELV Requirements Support	91
19 TDRS Project Office Operations and Spacecraft Engineering Support	95
22 RF Systems Laboratory and Technology Development	91
23 Space Network NISN HW/SW M&O	90
26 SDO Ground System Technical Support	86
27 Very Long Baseline Interferometry Space Geodesy Program support	96
28 GLAST Systems Engineering	91
32 Electronic Systems Test Laboratory Maintenance & Operations Support	96
40 Heritage SLR Network	92
60 SNAS Implementation	91
65 Space Network Formulation and Systems Engineering	96
68 THEMIS Hartebeesthoek Ground Station Support Services	90
80 Australian TDRSS Facility	80
86 SCIP & Constellation Support	91
87 SMTF Upgrade	75
88 High Rate Data Switch Replacement	88
91 Commercial S-Band Tracking Services for LRO Mission	91
95 User Services Access	50
99 GOES-O Support	100
102 Simulation Support to ESCP Customers	91
103 SNE-East Facilities Support	100
104 GRGT Data Interface System Replacement	61
109 TDRS K/L Ground System Support	98
110 Ground Network Scheduling System	89
112 Element Separator Synthesizer Replacement	92
113 SLR Development Projects	92
114 SNE-East Planning and Definition	60
117 User Services Subsystem Replacement (USSR) Project	80
118 WSC Ka-Band Propagation Measurement System Installation and Operations Task	94
119 SPTR2 Initial Engineering Task	100
120 WISE High Rate Processor Installation/Integration/Testing	98

122 Integrated Receiver Sustainment	91
124 NEN Constellation Services Planning	92
125 SGLT-3 Leveling Requirements	75
126 ISIS Tape Conversion	97
128 Guam Ka-Band Site Characterization Installation and Operations Task	93

Of the forty-seven tasks, thirty-one tasks were rated above 90 points--in the “excellent” range--and seven fall into the “very good” range. Only two tasks received a score of 60 or below, a score reflecting “poor/unsatisfactory” performance.

The two weakest scores in the PEB task order monitor system evaluations were for the User Services Access/USA (which received a 50) and the SNE-East planning and definition (receiving a 60). As mentioned above, the PEB task monitor’s assessment on SNE-E paints a mixed picture. The Summary reads:

Although the **technical quality of the critical path deliverables are now in relatively good shape**, such as the RTVM, SSDD and the antenna RFP documents, it was unacceptably difficult and inefficient to get to this point, significantly impacting cost and schedule to the project. There were some improvements noted late in this period, however, that occurred after descoping the task and it required significant government efforts to make the contractor aware of specific issues regarding their performance. The improvements were good, however, they were not sufficient to bring the score into the satisfactory range.⁶⁴ (emphasis added)

In August of 2009 (within a month of the above comments being written in the TOMS system) a report on impacts on NASA from the SNE-E failings was sent up to headquarters. Pete Vrotsos, the Director of Network Services in the Space Communications and Navigation Office at Headquarters noted that, **“The SNE-E lack of performance is attributed far more to NASA and the partners not fully agreeing on a workaround plan due to the overlap in the period of performance for the task between the NENS and SCNS contract.”**⁶⁵ (emphasis added) This is the kind of factor, the government’s own indecision on a task, that task monitors are told to take into consideration when evaluating a contractor’s performance according to the agency’s “Award Fee Contracting Guide,” but there is no mention of it in the task monitor’s write-up for the PEB.⁶⁶ Nor is there any mention of the reality of SNE-East: that it is not critical to NASA

⁶⁴ “SNE-East Planning and Definition” task monitor comments in TOMS for NENS PEB Performance Period 11.

⁶⁵ Note by Vrotsos on the draft presentation slides sent to headquarters by Nate Wright dated August 15, 2009.

⁶⁶ See text in section 3.6 Grading and Scoring Contractor Performance, “When Government actions impact contractor performance either positively or negatively... those actions should be considered in the scoring and

but something that other agencies may want.⁶⁷

Recall that the USSR task was also called out in the NASA management letter of June 9, but by July--a month after Scheve called for a letter with “teethy” language--the USSR task does not sound too bad. The USSR task receives an “80,” a score right at the top of the good range. The task monitor wrote: “In summary, NENS was doing a good job during this reported period. NENS was responsive to contract requirements. The delivery of the modem RFP was not as anticipated, however, it was not totally under NENS’s control taking into account the uncertainty during this period. Based on the progress made by NENS as of July 9 (date of end of period), it was expected that the finalization and release of the RFP package will be on time by August 3.” An 80 and “good job” does not sound like a reason to fold the item into a management letter to the contractor.

The USA task was more troubling in that the PEB record shows failures across the board to deliver promised design and engineering studies on time or in a condition that NASA considered usable. The possible impact of this would mean adopting a mitigation plan to work around the lack of new communications modems to support Ares 1-Y and Orion testing and launch. Analysis used by Nate Wright in a NENS “impacts” presentation for Headquarters shows the additional costs running to \$2.1 million over a 21 month period.⁶⁸ This is not a trivial failing. Those are costs for the taxpayer as well as costs to the agency in degraded performance from work arounds to get the communications support NASA needed for slated missions.

It is worth noting that at the same time the largely laudatory task monitor comments were coming in on HTSI’s NENS performance, there is evidence that headquarters was communicating with the COTR about Honeywell’s perceived weak performance on the contract. The complaints of Flaherty’s Code 452 group appear to have become the common NASA management perspective on HTSI even though the vast majority of the company’s work was rated at very good or excellent levels. It is worth quoting at length from an e-mail sent by Pete Vrotsos, the director of network services at the Headquarters Space Communications and Navigation Office (SCaN) to Nate Wright, the NENS COTR and Mary Ann Esfandiari, the NENS PEB Chair, for insight into Headquarters views. Vrotsos asks Wright on July 25 to produce an executive briefing packet for headquarters:

...While I have focused on USA/USSR, it was apparent once again that the overwhelming majority of development tasks have slipped once again, many day for day since the last SNQR [space network quarterly review meeting]. This is clear evidence of not only bad management, but an underlying technical weakness of trying to have an M&O contractor become a development house. The ability is

grading process,” “Award Fee Contracting Guide”.

⁶⁷ Interview with George Morrow, November 12, 2009.

⁶⁸ NENS to SCNS Contract Delay Impacts, August 15, 2009, “Space Network Impacts,” unnumbered.

not there now and won't be ther[sic] under the incumbent. What is the cliché about a silk purse out of a sow's ear!!!

The SCaN program is going to work this up thru Bill Gerstenmaier and highly likely the 9th floor. What I need by COB Friday, is a 10 page or so power point presentation for senior agency officials. The charts should lay out the problem and the specific impacts we are seeing in USA and USSR with the impacts...⁶⁹

The Performance Evaluation Board met in early August to examine the ratings. While the task order scores were shown in the table above, the breakdown for the purposes of rating the contractor's performance appears to be built around the Work Breakdown Structure used by management and the contracting staff. WBS 2.0 was the Core work for the Space Network Operations and Management. In this area, Honeywell received a 91--an "excellent."⁷⁰

WBS 3.0 were the ID/IQ space network Task Orders. These included the USA/USSR and SNE-E tasks. Despite the weak performance on two of those three items, the weighted average score for this area reported by the space network group was a 79.47, which equals the top of the "good" performance range. The method used to arrive at this score was that "(t)he individual NENS Task evaluation scores were reviewed internally by the SN, and then these scores were combined with a weighted approach based on actual Task costs incurred during the evaluation period."

For the Ground Network project (WBS is not identifiable in the documentation provided to the Committee), the process for reaching a score was similar to that used by the Space Network for ID/IQ work. "The individual NENS Task evaluation scores were reviewed internally by the GN, and then these were combined with a weighted approach based on actual Task costs incurred during the evaluation period."⁷¹ The "combined weighted score was a 90.37." This lies just short of the excellent range.

Finally, the Network Integration Management Office (NIMO) has several ID/IQ tasks with Honeywell and they awarded Honeywell a 91, another "excellent", for their support work. (It is unclear if the Committee has the full PEB submission from NIMO--and what we have does not

⁶⁹ Pete Vrotsos to Wright, Esfandiari, Clason, "RE: SCNS Impact statement," July 25, 2009. Note that Bill Gerstenmaier is the Source Selection Authority on SCNS. No further documents from the SCaN or headquarters offices relating to this exchange or the executive briefing documents appear to be among those delivered to the Committee.

⁷⁰ From an undated document produced by NASA labeled, "NENS Period 11 Space Network Project Performance Evaluation Summary, " p. 1.

⁷¹ . From an undated document produced by NASA labeled, "NENS Period 11 Ground Network Project Performance Evaluation Summary," p. 1.

show a WBS.)⁷²

How the panel took these scores, weighs them and works out a final score for program management and technical performance is not clear from the documentation, but it is easy to understand how excellent and near excellent scores in the Space Network M&O, NIMO and Ground Network tasks offset in large measure the merely good rating for Space Network ID/IQ work. The original technical performance score the PEB recommended for Honeywell was an 86--a "very good". This was combined with an 81 for program management and a 90 for cost control. All scores are fully in line with recent past scores as was the combined score of 86.

A draft of the resulting NENS fee determination letter was sent to George Morrow who, as head of GSFC Code 400, was the designated Fee Determination Official (FDO). Morrow rejected the letter out of hand. His e-mail to Nate Wright (COTR) and Mary Ann Esfandiari, (PEB Chair), in response to a request by Wright to meet and discuss the FDO letter, is worth quoting at length:

... I'm not sure what there is to talk about. Deb told me that she read you my note [the Committee staff cannot locate this record among those provided in response to our requests for documents]. My mouth just hung open when I started reading the letter this morning. There is no way that I will sign an FDO letter giving Honeywell an 86, Very Good, for their performance during the last period on NENS. I view their Bus/Mgmt as poor during the period and Tech/Sched as no better than satisfactory. You, Mary Ann, and others in 450 have done a great job of communicating the impacts and risks being realized due to Honeywell's poor performance on NENS. While their management tried to engage to retain critical skilled folks, etc., the trend as we discussed at pre-MSR and Roger Flaherty so eloquently stated at MSR hasn't appreciably changed and has resulted in a rising risk level on a critical national system that already has elevated risk due to outdated infrastructure, etc. SNE-E is another success story - read that poor story. Further, you are considering moving things off of NENS because of performance and other considerations. While I am sure if you take all the scores from the individual tasks and average them, you probably get scores like what you proposed. I don't consider everything equal, however, and what I've discussed above carries the weight in my view. **So, you must objectively rescore the period before there is any value in talking in my mind.** Before you rescore, just playback your external messaging from the past 6 months in your minds.⁷³
(emphasis added)

⁷² All quotes and scores appear to have been drawn from the PEB scoring package in documentation provided by NASA. There is supposed to be a PEB "Events Book" that would contain all the relevant materials and it is unclear whether the Committee received this in whole or in part (or at all).

⁷³ George Morrow to Nathaniel Wright with cc to Mary Esfandiari, David Scheve and George Barth e-mail, "Re: NENS FDO Letter," August 18, 2009, 11:48 am.

Esfandiari replied to Morrow:

I hear what you are saying. I thought we tried to do a fair and objective process across the whole body of work, but a few of us are going to regroup and relook at things and the message and we will get back to you.⁷⁴

Esfandiari sent Morrow's note to the PEB board members with an all caps warning, "DO NOT FORWARD THIS E-MAIL BEYOND TO and CC: ADDRESS LIST [sic]." She prefaces his note with, "George Morrow has taken issue with the draft NENS PEB letter. I have included his impression below. WE will reconvene the board as soon as possible. Any response or comments should not be sent beyond the list above."⁷⁵

The next morning, August 19, 2009, Esfandiari sent Wright an e-mail titled, "Summary of SN tasks and scores from the Toms system":

I pulled out the PEB book this morning to relook at the tasks and scores. Can you send me an e-mail that summarized the SN tasks and the task monitors scores for each. I'd like to look back at this 'message' that came to the board. I think there is a disconnect between words from Roger [Flaherty] at the Pre-MSRs and the MSR and the task scoring that went into the PEB. Is this the case?⁷⁶

Wright responded:

Attached is the SN summary. I don't think there is a disconnect. There [sic] recommended was 79.47, "Good". I may be wrong, but I believe we are being undermined. Someone has a direct pipeline to George and he doesn't have all the facts. The Good adjectival rating from the SN is only part of the story. The final overall score of 86, Very Good, for Tech/Schedule performance also takes into account the excellent performance on NIMO (91), very good performance for the GN (90), and the excellent performance on the Core (91). No one communicated

⁷⁴ Esfandiari to Morrow, Wright with cc to Scheve, Barth and Roger Clason e-mail, "RE: NENS FDO Letter," August 18, 2009, 12:57 pm.

⁷⁵ Esfandiari to Jon Walker (GSFC-4520), Patrick Crouse (GSFC-4440), Maria Mcnamee (GSFC -210M), Pietro Campanella (GSFC-4500), Scott Greateorex (GSFC-4501) and cc to Wright, Clason e-mail, August 18, 2009, 4:57 pm. Apparently a meeting was called for the next Monday, August 24, 2009.

⁷⁶ Esfandiari to Wright e-mail, "Summary of SN tasks and scores from the Toms system," August 19, 2009, 9:08 am.

this message to George.⁷⁷

While it is difficult to know if the Science and Technology Committee obtained all the documents related to reactions to Morrow's directive, the tone of those in hand (such as the comments by Wright) suggest discomfort. Maria McNamee, a PEB member from the procurement office, wrote back to Esfandiari:

I would like more insight as to the impacts the negatives have created. George feels strongly that these issues far outweigh the overall performance of the contractor. I agree that strong language needs to be in the letter and I would agree to lower the score to send a strong message but I would like to better understand the significance of the impacts of the negative events.⁷⁸

Esfandiari responded: "I suggest you call Roger Flaherty directly to get a more in-depth picture."⁷⁹

PEB member Scott Greatorex of the Network Integration Management Office (NIMO), which had several ID/IQ tasks with Honeywell and gave them a 91 for the period, also commented about the PEB score and the reevaluation. His two-page memo is worth quoting at some length:

Most, if not all, of the issue that George had concerning the letter dealt with the leaking of Honeywell... personnel associated with the Space Network [ID/IQ work], and particularly the Space Network Expansion (SNE)-East and User Services Access (USA) efforts. Not being involved with either of them, I cannot provide input concerning the impacts the Government has encountered on those efforts, or the repercussions or the degree that should levied, nor, I believe should anything I may contribute on the matter be received...

As provided in several correspondences with Nate, the Networks Integration Management Office (NIMO) does not have an issue with the declining numbers of HTSI employees...

Nate has the NIMO task evaluations (TO's 3, 4, 15, 17, 102, and 127), and I stand behind what was written and provided to the Performance Evaluation Board. None deal with the issues George wrote about, and all reflect the NIMO position

⁷⁷ Wright to Esfandiari e-mail, "RE: Summary of SN tasks and scores from the Toms system," August 19, 2009, 10:17 am.

⁷⁸ Maria McNamee to Esfandiari e-mail, August 20, 2009, 10:07 am.

⁷⁹ Esfandiari to McNamee with cc to Flaherty, Walker, Wright and Gitlin e-mail, August 20, 2009, 10:11 am.

on the performance of the contractor.⁸⁰

... I am not sure it is prudent, or shall I dare say fair, to impugn the entire contract for the difficult task of keeping people in a position when they see it in their personal best interest to seek employment elsewhere, for whatever reason.

Granted, some efforts by HTSI management may have precipitated the personnel movement, or their lack of aggressive countering could have been interpreted at HTSI's encouragement to separate, and both should be weighed against them.⁸¹

Ultimately, I think the PEB should, rather than re-evaluate the supplied evaluation, visit George and deliver the rational [sic] for the assessment provided, in an attempt to convince him to sign the letter. Those items he highlighted were considered in the evaluation, were discussed by the PEB, were weighted objectively and numerically within the tasks they originated from, weighted numerically against the overall organization's (SN, GN, NIMO, etc.) assessment, and weighed numerically across the entire Division work load and contract effort.

I think it would send the wrong signal to the contractor if the PEB were to pluck out one Program Management element or activity and significantly weigh the entire contract performance against that single lapse.

If the PEB determines that the endeavor is to alter the judgment and reconstruct the letter as George dictates, then I strongly encourage leaving the Cost and Technical determinations alone, and work the Program Management math and/or rational [sic] to come to George's desired conclusion-in which case, I would, grudgingly (for the second time), go along with what the rest of the PEB concludes.⁸² (emphasis added)

Esfandiari shares Greatorex's email with Nate Wright who writes back to her: "Scott's conclusion is what I expected and I also expect the same from the other board members."⁸³

There is no evidence that anyone on the PEB attempted to convince George Morrow to reconsider his position or suggested to him that the Board was uncomfortable with the direction he was demanding. Esfandiari dutifully set the PEB reevaluation for Monday the 24th even though Morrow had indicated that he would be on leave through Monday. The only effort to try to soften Morrow regarding the existing PEB evaluations came in the form of an e-mail to Morrow from Esfandiari sent near midnight on Sunday, August 23:

⁸⁰ "TO" stands for task order.

⁸¹ Greatorex is referring to two changes in Honeywell corporate policy--not just HTSI policy--as regards medical insurance and changes in retirement compensation.

⁸² Document marked, "Scott's NENS Performance Reevaluation Thoughts," attached to an email, "RE: NENS PEB Reconvene," dated August 19, 2009, 5:55 pm.

⁸³ Wright to Esfandiari, "RE: NENS PEB Reconvene," August 19, 2009.

George,

We are developing a rework of the NENS FDO letter and I have scheduled a reconvene of the PEB on Monday afternoon. I'm confident that we can provide the key message with this next draft.

I'd like to give you some information that I think has been an influencing factor in developing the FDO letter. As I have reread your e-mail several times (with headache medicine in hand! ☺), I agree completely that the message at Pre-MSRs and MSRs, and HQ PSRs, and PMRs is not consistent with the contents and scoring within the current FDO letter and I see this mixed signal as a failure on my part as PEB chair to ensure we delivered a much stronger message.⁸⁴

As good as Roger Flaherty is at his job of caring for the SN (and I admire his devotion and passion), he is a lone operator with a strong resistance to collaborative efforts and participation in Division processes. I agree that his message is well spoken and eloquently expressed at senior management and HQ forums, however, that is where it ends. You would think you arrived on a different planet when you travel to the SN Quarterly Review at White Sands. Roger and I have had several heated discussion at White Sands when he openly discouraged and limited comments and questions on delivery quality, schedules and staffing - the very content and issues so well expressed to GSFC and HQ senior managers! It is all positive with the contractors present. He refuses to serve on the PEB to represent SN. He does not communicate his concerns to his Deputies. Jon (Walker of Flaherty's shop) was on the PEB, participated in the discussions, accepted the scoring on the tasks, reviewed the letter and had no comments. Task reviews for the Core area came in with high scores, much higher than I expected. Why were these all marked 'concur' by SN management? Nate had set up a PEB process that everyone liked. Each NENS area could make their own decision about the weight of an area, rather than using the \$\$ amount.

Roger is rarely at the Monday morning HTSI report on their staffing and improvement efforts. He talks to the contractors alone and gives them changing priorities, sometimes even Tom Gitlin doesn't know he changed priorities. He does not like having a COTR, he wants to be the only person talking with the contractors. He's too busy for Division processes, sharing information, working with others.... it is a frustrating situation to work effectively with him, one that confuses his message when it is not held consistently outside of senior management forums and one that I believe would have resulted in perhaps a better FDO letter if Roger participated or shared with his Deputy. And this does not address the difficulties with interfaces to SGSS, TDRS, succession planning....

Mary Ann⁸⁵

⁸⁴ Esfandiari is citing a series of meetings that she identifies only by acronym. The acronyms (in order) stand for pre-Monthly Status Reviews, Monthly Status Reviews, Headquarters Program Status Reviews and Program Management Reviews.

⁸⁵ Esfandiari to Morrow, cc to Dave Scheve, "NENS FDO letter and PEB reconvene, August 23, 2009.

Esfandiari never explicitly suggested that the PEB did a good job or that the scores were right for the work done by the contractor. Esfandiari never pointed back to the PEP and NASA's own guidance to suggest if the FDO doesn't like a recommendation, it is the FDO's job to document and explain why. Instead of pushing Morrow, in this note she starts out by assuring him that there was going to be a "reconvene" of the PEB to approve a new letter with a stronger message. She even took responsibility for producing a score inconsistent with the kinds of information that had been offered to Morrow in prior months. However, she then went on to suggest that Morrow's key source on what is wrong with Honeywell may not be entirely reliable, and that the process for the PEB established by Nate Wright was fair to all who relied on Honeywell's services. The message to Morrow is garbled. While Morrow might focus on the "between the lines" defense of the PEB, he could just as easily have simply focused on the willingness of Esfandiari to deliver a PEB letter with the tone and scoring that Morrow demanded. The Committee staff has not received a copy of Morrow's response, if there was one, to Esfandiari's e-mail.

Maria McNamee indicated she would be on leave and could not make the scheduled session. Scott Greatorex was on travel and also could not attend. However, the PEB met on August 24 and it was decided to lower Honeywell's scores to accommodate Morrow's demand. The original scores had been an 81 for Program/Business Management, 86 for the Technical Performance, and 90 for Cost Performance. The new scores were a 60 for Program Management (which represents "poor" performance), a 66 for Technical Performance and an 85 for Cost Performance. The overall score given Honeywell for Period 11 was a 70. That was 20 points lower than their score for Period 10, 16 points lower than the original PEB score, putting Honeywell in the "satisfactory" range.

The record on the basis for the new scores was very thin and virtually no document--not a single note--has been produced from the work of the PEB. This is truly remarkable because NASA's Award Fee Guide contains an entire section on documentation. It reads, in part, that "Minutes of meetings or other documentation should summarize the information reviewed, including any additional or explanatory information provided by the contractor and the consideration given to all such information. Since the evaluation is a judgment based upon all pertinent information, that information needs to be identified, discussed and substantiated in the documentation."⁸⁶ While staff have not been provided any of these materials, the record does contain a short post-meeting e-mail from Esfandiari to Morrow with an attachment of the draft award fee letter.

⁸⁶ Award Fee Guide, section 3.7.4 Documentation. There should have been a rich record of the two meetings of the PEB. Instead, the meetings are devoid of evidence that they occurred absent some e-mails confirming their time and the drafts of possible FDO letters that were produced subsequent to each meeting. No minutes, no personal notes, no indications of what was or was not discussed exist, or were not provided to the Committee.

George,

Enclosed is the updated NENS award fee letter based on your recommendations. I understood from Nate (Wright) and Roger Clason that legal wants to see the FDO letter. I'd rather not supply this until you have had a chance to review and comment. **This letter does not match the scores from the task evaluations** but I understand the need and agree with ensuring that we deliver the right message. Let me know when it is OK to send to legal. (emphasis added)⁸⁷

The new scores could only be assigned if the rating system put in place for the PEB process was completely suspended. As Esfandiari stated, the "letter does not match the scores from the task evaluations." This simple observation understates the fact that the vast body of Honeywell's work, as well as NASA's own established procedures, became irrelevant to the performance score assigned the company in the 11th period.

To put this in perspective, the two projects that received the lowest scores--USA and SNE-E upgrade--represented \$4.1 million out of period performance costs of approximately \$139 million. Three percent of the effort given to the contractor ended up dragging down ninety-seven percent of HTSI's work into a score range completely out of line with the overwhelming majority of the work effort.

Effectively, Morrow undermined the rule-bound process that he was in charge of. Remember that any changes to the PEP were to be approved by Morrow and the Associate Director of Acquisitions at Goddard. Morrow was responsible for the plan and he was responsible for unilaterally abandoning it. NASA's award fee guidance indicates that the FDO was to meet with the PEB to discuss their recommendation, but Morrow refused to meet. Further, the award fee guidance places enormous emphasis on documentation to support the PEB's recommendations. The award fee guide reads, "The FDO will want to review the documentation to satisfy any concerns regarding contractor performance before deciding whether to accept the recommended

⁸⁷ Esfandiari to Morrow e-mail, "Updated NENS Award-Fee Letter," August 26, 2009. In a subsequent e-mail, Esfandiari expresses concern that legal is getting involved in the FDO letter. She wrote, "I'm concerned about getting into a situation where we become fearful about taking needed action and legal gets into the loop on everything. I am in agreement on your recommended changes to the FDO letter. Roger Flaherty is also in agreement with the contents and he is going to work more closely with me on ensuring that the message is consistent throughout." (Esfandiari to Morrow and Sceve, "Comments on latest NENS FDO draft," August 29, 2009). Esfandiari's expressed agreement with Morrow's "recommended changes," is in contrast to her reaction to Morrow's guidance to re-write the performance evaluation shared with Nate Wright. Morrow responds on April 30, "As far as legal goes, they are worried that the letter will come across as overly critical and out of character with our normal tactics in relation to the SCNS protest. It's just an informal sanity check." (Morrow to Esfandiari and Sceve, e-mail, August 30, 2009). There is no further information about what legal knew about the letter's background or what they were asked or interested in reviewing. No records related to a review by the Counsel's office were produced to the Committee.

award fee or some higher or lower amount.⁸⁸ Morrow acknowledged to Committee staff that he did not look at any of the relevant documentation.⁸⁹

Finally, if Morrow wished to deviate from the PEB's fee determination recommendations according to NASA's policies he was supposed to take the initiative and fully document his reasons in the contract file. Morrow invented a new process on the fly. Why Morrow, or NASA more broadly, would so highly value performance on two work areas where neither lives, nor mission successes, nor core performance were on the line is difficult to say. Confusingly, in an interview with Committee staff, Morrow asserted that he believed the day-to-day management of space communications should be more heavily weighted in assessing the contractor's performance than, for example, SNE-East or the loss of particular personnel. The core of the contract, the day-to-day management of space communications, received a 91 score in the PEB process. How Morrow, and NASA management, came to be captured by the perspective of a handful of staff in Code 452 and were blinded to the performance he asserted he most valued is difficult to explain.⁹⁰

An obvious possibility is that NASA or Goddard Center management wanted to see Honeywell's performance score reduced to continue to rebalance the SCNS competition in a way that would allow NASA to justify lowering Honeywell's past performance score. The push to start a management warning letter came only after the GAO appeal on past performance issues has been launched by Honeywell. The effort receives support from management--someone had "greased the skids" as Sobchak put it in his e-mail. By the time Morrow orders the PEB to go back to work and come up with a lowered award fee evaluation, NASA has lost on the past performance issue and Honeywell has to be reduced in its award if the agency, or the Center, hopes to be able to make the award--for a third time--to ITT. Since the award fee determination is a non-appealable decision it is a perfect way to damage Honeywell's chances for the SCNS award. Awarding HTSI a "satisfactory" would open the door to NASA recalculating the SCNS contract bids with a clear edge to ITT.

The other possibility is that Morrow believed that Honeywell honestly deserved a lower score. However, when staff interviewed Morrow about his decision to send the fee determination letter draft back to the board for reductions in the score and tougher language, he indicated that he had never looked at the PEB task monitor reviews. Nor had he ever looked at the performance of the contractor across the broad sweep of their contract. Nor had he ever reexamined the Areas of Emphasis letters NASA had sent to the contractor to see what the contractor believed NASA wanted done in the period. Finally, he had never asked anyone on his staff to independently verify the claims he was hearing regarding staff and skill erosion. He took no steps to verify that his impression of Honeywell's performance was based on complete or accurate information nor

⁸⁸ Award Fee Guide, section 3.7.4 Documentation.

⁸⁹ Committee staff George Morrow interview, November 12, 2009.

⁹⁰ Morrow interview, November 12, 2009.

to place the reported problem areas in perspective against the total effort of the contractor. His belief that Honeywell deserved a low performance rating was not built on verified evidence or a full record.

Further, Morrow was certainly aware both of the continued extension of the SCNS competition and the problem NASA had with ITT's past performance evaluation. It is difficult to believe that Morrow would not understand the impact of a dramatic falloff in Honeywell's scores for period 11 on the SCNS competition. The context of his actions suggested that he should take more care than usual in exercising his authority as FDO. But there is no evidence that he took any particular care in examining the fairness or accuracy of his information or his directions to the PEB. Not only did Morrow not engage in diligent reflection on the performance of the contractor, he would not even agree to meet with the PEB to understand the rationale for their original fee determination scoring as the PEP and Award Fee Guide both suggest should happen. This represents a total breakdown in process for the 11th period NENS award.

Neither scenario reflects well on NASA. Either the agency, or the Center, purposely acted in a way designed to unbalance the SCNS competition, or a senior official at the Center acted in a manner that amounts to arbitrary and capricious conduct, possibly with full knowledge of the potential ramifications for the SCNS competition.

A small consolation for Honeywell came in the 12th Performance Period assessment. For the 12th period, from July 9, 2009 to January 8, 2010, Honeywell "bounced back" and received an 89 for program management (a 29 point improvement), an 82 for technical performance, an 88 for cost performance and an 85 for their consolidated score. However, Geoff Sage and the acquisitions staff had already closed the new "past performance" submissions for SCNS on October 27, 2009 before these scores were awarded. The last snapshot NASA evaluators had of HTSI in the SCNS process is of a company that was in steep decline with "poor" program management and a merely "satisfactory" score for their overall performance.⁹¹

Conclusion

The NASA acquisitions staff neglected key issues surrounding the agency's reliance on ITT for systems engineering work directly related to HTSI's management and engineering operation of the space and ground communications networks. In neglecting that situation, acquisitions staff did not take the steps necessary to make sure that there were no unmitigated OCI issues. In short, they did not do what must be done to guarantee fair competition. Instead, they did a bare

⁹¹ Scores were provided to the Committee by Honeywell. On the past performance closure date and submissions of references see, "Sage to Kim Quail (HTSI) e-mail, "SCNS Next Steps," October 2, 2009.

minimum effort as a last-minute insurance policy against a possible complaint to the Comptroller General. In the end, NASA has been happy to rely on Honeywell neglecting to make a timely complaint about OCI to the GAO, thus taking it outside substantive review by the GAO contract award review process. NASA acquisitions staff evaded following the FAR, or acting to guarantee a fair and open competition, by clinging to a series of technicalities that put the burden on Honeywell to act to catch NASA doing wrong. This is hardly the kind of proactive attention to fair and open competition that the Congress expects of NASA or that the leadership of the agency should reward or tolerate.

Add to this the very strange conduct by NASA managers in Honeywell's performance evaluation for "period 11" of the NENS contract. The unusual steps taken by the FDO effectively erased any potential advantage HTSI had in past performance in the wake of GAO's second appeal ruling on the SCNS contract award. As a result of the FDO's intervention (regardless of motive), not only did NASA fail to guarantee fair competition, it created an appearance that the agency had an agenda to insure that one of the bidders would win the competition.

In the SCNS competition, there has been an accretion of actions that through negligence or intent have the effect of skewing the agency towards one firm over the other. This is simply unacceptable conduct and must be corrected. The management of the SCNS acquisition points to several lessons that can be learned from this situation.

First, the challenge of keeping track of how engineering firms advising the agency may or may not undermine fair and open requires that the agency aggressively educate their acquisitions staff to the complexities of managing systems engineering firms in the competitive process. Further, contract management staff need to be more active in identifying potential OCI issues as they manage work with contractors. The current approach among contract managers, at least at GSFC, relies on contractors to take the initiative to identify such situations and expects firms to take steps to self-enforce mitigation plans. This approach to managing contracts is too passive and too easily evaded if a firm is intent on seeking out advantages based on privileged access.

Second, Fee Determination Officials and Performance Evaluation Boards need to be retrained in their responsibilities, processes, record-keeping and appropriate conduct based on agency guidance and Performance Evaluation Plans. The conduct of both the FDO and the Chair of the PEB on NENS failed to live up to expectations of fairness or careful use of award fees to create clear signals about priorities and rewards for good performance. That the abuses and evasions of NASA policy on award fee contract management came in the middle of a contested follow-on contract that was notoriously hung up over past performance scores and evaluations makes this conduct all the more deplorable. The total absence of meaningful records surrounding the PEB's score for the NENS Period 11 award is in direct opposition to agency guidance and makes fully understanding the conduct of the board all the more difficult.

Third, the Counsel's office needs to encourage acquisitions and management staff to adhere to the letter and spirit of the law, and not simply search for those provisions that protect or shield incompetent or arbitrary conduct. There is no evidence provided to the Committee that the counsel's office at GSFC ever took steps to be satisfied that the SCNS competition had not been undermined by the extraordinary failure of the acquisitions staff to make positive determinations, early in the competition, about whether there were Organizational Conflict of Interest issues at play in ITT's expressed interest in the SCNS contract. Instead, counsel appeared all too ready to want to enable the acquisitions side to move forward regardless of substantive compliance with the FAR. There is no evidence that the Counsel's office took any steps to probe whether there was meaningful compliance by the FDO and PEB with the rules that are supposed to bind award fee determinations.

The lack of attention to FAR and award fee management processes suggests a cavalier attitude about the rules that are designed to keep the agency oriented towards fair competitions and fair management of contracts. These rules are not a convenience for the agency that they can simply cast aside when it suits them. These rules are there to protect the interests of the taxpayers that they are getting the best value for their money. These rules are also there to guarantee that contractors understand what they are expected to accomplish with taxpayer dollars and that they are appropriately rewarded or penalized for their work. When acquisition rules are arbitrarily set aside, it creates a situation where the Agency cannot assure the public or the Congress that they have gotten best value for the taxpayer. When the award fee processes are undermined, it contributes to an atmosphere where contractors have less incentive to compete for government work for fear that they will not be treated fairly; less competition tends to raise the costs to entice bidders.

While management at all levels of the agency needs to emphasize the importance of adhering to the policies, processes and laws that are put in place to guide agency employees, the Counsel's office has a special responsibility to ask hard questions, emphasize the need to adhere to the rules and act to ensure that staff understand their special obligations. Counsels must both model highly ethical conduct in everything they do, and communicate to managers and line staff that they expect the same of them. The SCNS case suggests that NASA counsels are not fully following these principles.